DATO' TAN KIM HOR & ORS

v.

TAN CHONG CONSOLIDATED SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ZAINUN ALI J
[SUIT NO: D2-24-212-2000]
31 JULY 2001

COMPANY LAW: *Accounts - Inspection, application for - Whether application made on bad faith - Whether letter of undertaking complied with statutory requirements - Companies Act 1965, s. 167(6)*

COMPANY LAW: *Directors - Right to inspection of accounts - Whether unfettered - Whether right not available if bad faith is proved - Companies Act 1965, s. 167(6)*

In this case, the plaintiffs/directors applied to inspect the accounting and other records of the defendant company under s. 167(6) of the Companies Act 1965 ('the Act') and furnished a letter of undertaking by a qualified auditor acting for the plaintiffs in this respect. The defendant objected to the application submitting that the application was made for some ulterior purpose other than for its interest and cited several instances of apparent bad faith by the plaintiffs.

The issues: (1) whether the defendant had proved bad faith on the part of the plaintiffs; and (2) whether the letter of undertaking furnished by the plaintiffs complied with s. 167(6) of the Act.

Held:

[1] The right of a director to inspect accounting and other records under s. 167(6) of the Act is a concomitant of the fiduciary duties of good faith, care, skill and diligence which the director owes to the company. It is implicit therefore that this right must be exercised for the benefit of the company. However, although the right of inspection is unqualified **but** if it is proved that a director is acting or is about to act in breach of his fiduciary duty to the company and intends to aid that process by inspecting the books, then his right to inspection disappears. (pp 323 g-h, 325 b-c & 327 a-e)

[2] The burden of proof was on the defendant to show clear proof that the grant of the right of inspection would be for the purpose that would be detrimental to its interests. There must be a real ground that the right would be abused and that a great deal of harm would be caused to the defendant.

The evidence showed that the intention of the plaintiffs in inspecting the books did not appear to be borne out of altruistic motives. The plaintiffs had manifested strong propensities of acting in breach of their fiduciary duties towards the defendant. However, the burden of proof had not been discharged since no 'real ground' could be positively asserted. (p 325 h-i)

[3] As the requirements of the undertaking under s. 167(6) of the Act is statutory, great care ought to be taken to strictly observe the language expressed in the said section in formulating the undertaking. Section 167(6) provides that the court may make an order '… but only upon an undertaking in writing given to the court that the information acquired by the auditor during his inspection shall not be disclosed by him except to that director'. In the present case, the undertaking furnished by the auditor was not addressed to the court or to anyone in particular. Further, the auditor had extended the class of persons to whom he might disclose the results of his inspection, ie, to his own officers, employees, appointed servants and/or agents and also to the plaintiffs' appointed servants and/or agents. As such, the said undertaking was found wanting of the express requirements of s. 167(6). (pp 328 f-h & 329 a-b)

[4] By virtue of the words 'but only upon an undertaking' in s. 167(6) of the Act, the court's power to make the order sought by the plaintiffs had not arisen due to the plaintiffs' failure to furnish the required undertaking. The plaintiffs' subsequent attempt at correcting an otherwise defective letter of undertaking was feeble and unsustainable. (p 329 b-c, g)

[Application dismissed.]

Case(s) referred to:

Australian Metropolitan Life Assurance Co Ltd & Ors [1923] 33 CLR 199 ***(refd)***
Berlei Hestia (NZ) Ltd v. Fernyhough [1980] 2 NZLR 150 ***(foll)***
Caparo Industries PLC v. Dickman & Ors [1990] 1 All ER 568 ***(refd)***
Choe Kuan Him, Advocate & Solicitor, T Damodran v. Choe Kuan Him [1975] 1 LNS 143 ***(refd)***
Conway & Ors v. Petronius Clothing Co Ltd & Ors [1978] 1 All ER 185 ***(refd)***
Dato' Aw Kow v. Haw Par Brothers (Pte) Ltd [1972] 2 MLJ 225 ***(refd)***
Edman v. Ross [1922] 22 SR (NSW) 35 ***(refd)***
Haw Par Brothers v. Dato' Aw Kow [1973] 2 MLJ 169 ***(refd)***
Michael C Solle v. United Malayan Banking Corporation [1984] 1 CLJ 151; [1984] 1 CLJ (Rep) 267 FC ***(refd)***
Molomby v. Whitehead & Australisn Broadcasting Crop [1985] 63 ALR 282 ***(refd)***
Re Funerals of Distinction Pty Ltd [1963] NSWR 614 ***(refd)***
Welch & Anor v. Britannia Industries Pte Ltd [1993] 1 SLR 673 ***(refd)***
Wuu Khek Chiang George v. ECRC Land Pte Ltd [1999] 3 SLR 65 ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 167(1), (3), (6), 169(1)

For the plaintiffs - MK Yee; M/s Shearn Delamore & Co
For the defendant - Lim Kian Leong; M/s Lim Kian Leong & Co

Reported by Usha Thiagarajah

JUDGMENT

Zainun Ali J:
In the plaintiffs' application to inspect the accounting and other records of the defendant company under s. 167(6) of the Companies Act 1965, several issues surfaced, not least with regards to questions of absolute rights under the common law and statutory requirements in connection therewith.

Brief Facts
As can be recounted, the plaintiffs are the directors of the defendant company and have been so, for the better part of the decade.

The defendant company is a company incorporated as a public company on 7 June 1972.

The plaintiffs' application is in pursuance of s. 167(6) of the Companies Act 1965, for an order that the record of accounts and other records of the defendant's company be open for inspection by a qualified auditor one Yee Eng Seng, acting for the plaintiffs, within 30 days of the order.

Section 167(6) Companies Act 1965 reads as follows:

> (6) The Court may in any particular case order that the accounting and other records of a company be open to inspection by an approved company auditor acting for a director, but only upon an undertaking in writing given to the Court that information acquired by the auditor during his inspection shall not be disclosed by him except to that director.

The grounds of the plaintiff's application is that since the defendant is a public listed company, it is requisite that an accredited independent auditor be appointed to inspect and interpret the information obtained during inspection, as the plaintiffs do not comprehend and are unfamiliar as to how company records are maintained.

All the plaintiffs have purportedly given an undertaking not to reveal any information obtained by the auditor after their inspection, except to themselves as directors.

The said undertaking is a requirement under s. 167(6) Companies Act 1965. The plaintiffs' undertaking, purportedly made in pursuance of the above s. 167(6) reads thus:

Letter of Undertaking

Undertaking During Inspection of the records of Tan Chong Consolidated Sdn. Bhd.

1. Yeo Eng Seng, an approved company auditor and a partner of Ernst & Young, act for Dato' Tan Kim Hor, Tan Kheng Leong @ Tan Hoy Shoi, Tan Kang Leong and Tan Boon Pun.

Save as required by law or a court order, I hereby undertake not to disclose or otherwise make available to any third party any information acquired during an inspection of the accounting and other records of Tan Chong Consolidated Sdn. Bhd. **except to those of my officers, employees, appointed servants or agents who are required by me in the course of the inspection to receive and consider the information and to**: (emphasis added)

Dato' Tan Kim Hor;

Tan Kheng Leong @ Tan Hoy Shoi;

Tan Keng Leong; and

Tan Boon Pun

who are directors of Tan Chong Consolidated Sdn. Bhd. **and/or their appointed servants/agents of the same.** (emphasis added).

This undertaking shall not apply to information or document which is or has already have been made lawfully available to the public and this undertaking is governed by and shall be construed in accordance with Malaysian Law.

Yours faithfully

Yeo Eng Seng
Partner
Ernst & Young

Dated this: 22 August 2000

The Facts

The plaintiffs were the majority on the Board from 1985 until 25 August 2000. They were in effective control of the day to day management of the defendant for more than 15 years up until just three days before the originating summons was filed. Thus from 1985 until 25 August 2000, the defendant company had seven directors, four of whom were the plaintiffs, and two additional directors were appointed on 25 August 2000 at the AGM of the defendant company.

It is to be noted that the letter of undertaking from the auditor is dated 22 August 2000 and the originating summons was filed three days later, ie, on 25 August 2000.

It is a fact that the plaintiffs voted to reappoint the auditors on 25 August 2000 at the EGM. It is also a fact that the auditors have offered to assist the plaintiffs to explain the accounts, but the offer was not taken up.

It is a fact that the 1st plaintiff regularly signs the accounts of the defendant company, including the last audited accounts for the year 1999. In fact the plaintiffs have approved the accounts of the defendant company, every year, including the latest accounts just three days before the originating summons was filed.

It would be fair to say that the plaintiffs for the past 15 years, have been exercising control and management over the preparation of the defendant company's accounts.

The Plaintiffs' Case

It is the plaintiffs' case that as directors, their right to inspect accounts and other records of the company is unfettered.

The plaintiffs went on to say that at common law now codified in statute, a director has the right of inspection of any documents such as accounting and other records of the company.

It is also the plaintiffs' case that their right flowed from their office as directors, to enable them to perform their duties as directors, and that no reason need be given by them to inspect the accounting and other records. The plaintiffs stressed that the right of a director to inspect the accounting and other records of the company has been described as 'absolute' – see *Dato' Aw Kow v. Haw Par Brothers (Pte) Ltd* [1972] 2 MLJ 225.

However in the *Haw Par* case, Wee Chong Jin, CJ observed that whilst s. 167(3) gives an absolute right to inspect the accounting and other records required to be kept by a company and its directors under s. 167(1), this right is reposed only in persons who are then directors of the company.

This right does not extend to ex-directors. If an ex-director wishes to inspect such accounts and other records, he must rely on other grounds and not on s. 167(3).

The Defendant's Case

In response, the defendant concedes that whilst it is the general rule that a director's right to inspect accounting and other records is an absolute right, the corollary of this is that, that right would be lost where it was exercised not to advance the interest of the company but to injure it, or it is done for some other ulterior purpose.

The defendant cited instances of apparent bad faith by the plaintiffs through the flurry of affidavits filed between the parties.

Briefly as could be observed, the affidavit of Tan Kim Hor (the 1st plaintiff) affirmed on 21 April 2001 at paras. 11, 15 and 17, deny any intention of filing a winding-up petition.

However on 21 May 2001, the plaintiffs did just that. A winding-up petition was filed. In fact exh. D to the petition enclosed a letter of 7 September 1999 and memorandum showing their intention to do so. This same intention is again reflected in a letter of 18 April 2001 from the plaintiffs' solicitor which the defendant says, should be read together with a second memorandum.

The defendant contends that since the plaintiffs had never, at any time, alleged any wrongdoing or irregularity in the accounting or other records of the defendant, for the plaintiffs to now surreptitiously prepare themselves to wind up the defendant company in doing what they did, which amongst others, seek to inspect the defendant company accounts, therefore appears dubious and by the same token, speaks of motives which may not be entirely innocuous.

Another area of dissension which the defendant raised, is the issue of the plaintiffs' alleged ignorance of accounting and other records, which ignorance, defendant claim, is feigned.

The defendant says that as the 1st plaintiff is the chairman of Tan Chong Motor Holding, a public listed company since 1973 and of various other companies within the Tan Chong Group, his involvement in the management, including financial, is total. In fact the defendant contends that the plaintiffs as directors, owe statutory duties to keep proper accounting and other records as will sufficiently explain and give a fair and true view of the financial status of the company and to review and give a report on the financial status of the company. These statutory duties are designed to ensure that directors will keep themselves informed about the financial affairs of the company.

The defendant now asserts that since the plaintiffs had all along approved the annual accounts by the defendant company, it is not open for them to now plead ignorance of interpretation of the accounting information which they had themselves signed and approved. In fact the defendant said that for the plaintiffs

to now declare ignorance, tantamount to perjury, since they had made declarations (as directors) that the accounts give a "true and fair view" of the state of the company.

The defendant also provided evidence of the plaintiffs' credentials as persons who have accounting and financial skills and defendant asserts that to profess their ignorance now is not only mischievous but perjurious.

The defendants also noted that none of the plaintiffs had alleged wrongdoing or dissatisfaction with the accounts or records of the defendants, much less seek assistance from the defendant's auditors in interpreting the accounts for them.

It is also the defendant's case that being an exempt private company, the privacy of its accounts must be maintained, a *fortiori* when the plaintiffs themselves have not adduced any reason why an internal auditor should inspect the defendant company's private records.

The defendant further affirmed that since there is no management dispute, the plaintiffs' application is therefore suspect, consequentially placing this application in the category of abuse of process of court.

The Legal Position

Firstly, this court shall deal briefly with the extent of the right of a director of a company to inspect the accounting and other records of the company.

Though the right of director to inspect the accounting and other records is a common law right, the limits of the rights should not be ascertained by categorizing it as a common law right or a statutory right.

Since the right had its origins from the common law before being embodied in statute, the issue is, was it modified in the process of codification.

What is the exact position?

It is this. The right exists but it is a right conferred by common law and not by statute. Thus the relevant provision in the Companies Act 1965, recognizes the existence of this right at common law.

This explains the criminal sanctions imposed, in the event proper books of account are not kept or not made available for inspection or in the event of a breach of any of the other duties imposed by the section.

Thus the right of a director to inspect accounting and other records is a concomitant of the fiduciary duties of good faith, care, skill and diligence which the director owes to the company. It is implicit therefore that this right must be exercised for the benefit of the company.

The language of s. 167 shows the obligation of the company to allow inspection by its directors of the accounting and other records as mandatory. As authorities such as *Caparo Industries PLC v. Dickman & Others* [1990] 1 All ER 568 have shown, company directors are required by law under s. 169(1) Companies Act 1965, to lay the company accounts at its Annual General Meeting before its members.

In the words of Lord Jauncey in the above case, the purpose of the annual accounts so far as members are concerned is:

> ... to enable them to question the past management of the company, to exercise their voting rights, if so advised, and to influence future policy and management.

Thus this right has often been described as "absolute" (see *Haw Par Brothers v. Dato' Aw Kow* [1973] 2 MLJ 169). In *Welch and Anor v. Britannia Industries Pte Ltd.* [1993] 1 SLR 673, the court observed that the right of inspection is an absolute right. However the court there went on to say that 'absolute right' does not translate into entitling the director to inspect books and accounts in all circumstances without restriction, but rather that the right flows from his office and he does not have to justify his desire to inspect.

As succinctly put by Street CJ, in *Edman v. Ross* [1922] 22 SR (NSW) 35, the director cannot be called upon to furnish his reasons before being allowed to exercise the right and in the absence of clear proof to the contrary, the court must assume that he will exercise it for the benefit of the company.

Thus "absolute right" indicates that by virtue of his office, a director is *prima facie* entitled to inspection and ex hypothesis, he has the right of access and is not required to demonstrate any particular ground or 'need to know' as a basis.

It is interesting to note that in *Molomby v. Whitehead & Australian Broadcasting Crop* [1985] 63 ALR 282, Benmont J of the Federal Court of Australia said:

> In my opinion, in declining access to Molomby (the director requesting for inspection) the company fell into an error of law. The error consisted of a failure to recognize that, as a Director of the corporation, Molomby had a *prima facie* entitlement to access to the corporate material and that, in the absence of good cause to the contrary and none existed here, Molomby should be permitted to inspect the documents nominated by him.

Slade J in *Conway & Others v. Petronius Clothing Co Ltd & Others* [1978] 1 All ER 185, *inter alia*, concluded that the right exists at common law, but the court is left with a residue of discretion as to whether or not to order inspection.

The judge went on to observe that though a director will not be called upon to furnish his reason before being allowed to exercise his right of inspection, the court would in such a case, restrain him in the exercise of the right, if satisfied affirmatively that his intention was to abuse the confidence reposed in him as director and materially to injure the company and that in the absence of clear proof to the contrary, the court would assume that he was exercising it for the benefit of his company.

However Mahon J in *Berlei Hestia (NZ) Ltd v. Fernyhough* [1980] 2 NZLR 150, took a slightly different approach from Slade J. His Lordship disagreed that there was a residual discretion in the court to refuse inspection. Justice Mahon's view is that the right of inspection is unqualified but that where it is proven that a director is acting or is about to act in breach of his fiduciary duty to the company and intends to facilitate that process by inspecting the books, then his right to inspection is completely dissipated.

This court is of like view. It is therefore this court's approach that where the court disallows a director his right of inspection of the books and other records of the company, the court in effect is not exercising "a residual discretion." The court in such a situation, is satisfied, on the basis of the evidence before it that the intention of the director in inspecting the books and records is to make use of the information for ulterior purposes, such as with a view to causing detriment to the company and that the director is thus abusing the confidence reposed in him as director.

This court observes that a director's right to inspect the books and records of the company is vital for him in the performance of his duty as director, including the duty to ensure that the company complies with the requirement as to accounts set out in the Companies Act. This right is crucial, as the books and records of a company are a primary and sometimes, the only source of information as to the state of affairs of a company.

Burden Of Proof

On whom lies the burden that the right is being or will be exercised for improper purpose?

The ready answer to that is, on the person who asserts it, per Isaacs J in *Australian Metropolitan Life Assurance Co. Ltd & Others* [1923] 33 CLR 199.

The defendant in this case therefore has to show clear proof and satisfy this court affirmatively that the grant of the right of inspection would be for the purpose which would be detrimental to the interests of the company. In short, there must be a 'real ground' that the right would be abused, and that a great deal of harm would be caused to the company thereby.

Reverting to the facts in the instant case, the issue is whether the plaintiff's conduct in the present case is sufficient to justify this court denying him his right of inspection.

Given the apparent guile employed by the plaintiffs to inspect the records aforementioned, it would be irresistible to conclude that theirs is a case, calculated to create a general air of misgiving with regards the well-being of the company.

Just consider the plaintiffs' vehement denial of intention to file a winding-up petition (affirmed on 22 March 2001), only later to have that intention coming to pass, when the plaintiffs did file the said petition on 25 October 2001.

Consider the plaintiffs' demur on their accounting knowledge, when in fact each one of them have varying levels of knowledge of accounting. Consider too the plaintiffs' omission to disclose that they were in effective control of the day to day management of the defendant for more then fifteen years up until just three days before the originating summons was filed.

Consider also the plaintiffs' denial that the defendant company is an exempt private company, when in fact the 1st plaintiff had, for the last six years claimed it to be so, when he signed certificates to that affect.

This court however concedes that all the above facts and the fact that the plaintiffs had not expressed dissatisfaction with the defendant company's auditors may be irrelevant to the plaintiffs' right of inspection.

It may also be irrelevant that the plaintiffs voted to re-appoint the said auditors; or that no reasons were given by the plaintiffs to inspect the accounting and other records.

However these facts in their entirety, when viewed in the context of the plaintiffs' conduct, especially the plaintiffs' volte face in petitioning to wind up the defendant soon after, appear questionable. In the light of the above, the plaintiffs' single act in petitioning to wind-up lies heavily within the realm of acting "against the company's interests" as construed in the context of the authorities cited.

Thus on the authority of *Wuu Khek Chiang George v. ECRC Land Pte Ltd* [1999] 3 SLR 65 the right of inspection is unqualified, but where it is proved that a director is acting or is about to act in breach of his fiduciary duty to the company and intends to aid that process by inspecting the books, then his right to inspection disappears.

Likewise in the instant case. On the basis of the evidence before this court, this court is satisfied that the intention of the plaintiffs in inspecting the books does not appear to be borne out of altruistic motives. However the question remains. Is the evidence of ulterior motive sufficient to dissipate the rights of inspecting the records by the plaintiff directors?

Despite the inimical conduct of the plaintiffs, this court is mindful of the observation of Kau Ting Chu JC in *Welch v. Britania Industries Pte Ltd* [1993] 1 SLR, who said:

> ... It is not for the Court at the hearing of an application (to inspect accounts and records) to go into the disputes between the contending parties and I will not deal with the charges and counter charges of the plaintiffs and Rajen Piliai (Defendant), beyond saying that they show clearly that the plaintiffs were concerned over the company's account before they made their application.

Even so, the odds against the plaintiff directors in the instant case are overwhelming, and this court is inclined to view that the plaintiffs have manifested strong propensities of acting in breach of their fiduciary duty towards the company.

However this court is reluctant to affirmatively find that the burden of proof had been discharged since no 'real ground' can be positively asserted.

A second, but nevertheless a critical point in this application is the question of whether the undertaking given by the auditor is good undertaking within the legal framework of s. 167(6) Companies Act 1965.

In the instant case, the plaintiffs' application under s. 167(6) Companies Act 1965 brings the court's discretion to grant relief into focus, even if that discretion is but a narrow one.

As authorities such as *Welch & Anor v. Britania Industries Pty Ltd* [1993] SLR 673 have shown, where appropriate, the court may order that the accounting and other records be open to inspection by an approved company auditor acting for a director. The court will only grant the order upon a written undertaking given to the court that the information required by the new auditor during his inspection must not be disclosed by him to anyone other than to the instructing director.

Thus, as another of general principle, the court has limited discretion to refuse to grant such an order (see *Re Funerals of Distinction Pty Ltd* [1963] NSWR 614), unless improper motives against the company is made out.

In the instant case, the plaintiff's application under s. 167(6) Companies Act 1965 brings the court's discretion to grant relief into focus, even if that discretion is but a narrow one.

As authorities such as *Berlei Hestia (NZ) Ltd v. Feryhough* [1980] 1 SLR 673 have shown, the court as a matter of general principle, has limited discretion to disallow a director's application under s. 167(6), since a director's right under s. 167(6), is not fettered, save where a strong case for refusal is made out.

Since the court's discretion in s. 167(6) hinges on the letter of undertaking to be furnished therein, it behoves us to look at the meaning of the word of in question.

An 'undertaking' is defined in *Burton's Legal Thesaurus* 3rd edn, as "agreement, assurance, commitment, contract, warrant ...".

In the words of Hashim Yeop Sani FJ in *Michael C Solle v. United Malayan Banking Corporation* [1984] 1 CLJ 151.

> ... The principles of construction to be applied to the undertaking are similar to those applied to an ordinary contract. The intentions of the parties are to be gathered from the language they used. They are presumed to have intended what they said.

Then, in *Re Choe Kuan Him, Advocate & Solicitor. T. Damodran v. Choe Kuan Him* [1975] 1 LNS 143, Syed Agil Barakbah, J, observed that:

> .... great care ought therefore to be paid to wording of an undertaking both by the solicitor giving it and by the person accepting. It must be clearly worded so as to express the intentions of both parries and this is all the more so when the undertaking is given to a person who is not a solicitor.

In the instant case, the requirements of the undertaking is statutory. In the light of the cases cited, great care too ought be taken to strictly observe the language expressed in s. 167(6) in formulating the undertaking.

Since the words of s. 167(6) are clear and straightforward, the common and universal principle is that "an agreement ought to receive that construction which its language will admit ..." (per Syed Agil Barakbah FJ in *Michael C Solle v. United Malayan Banking Corporation* [1984] 1 CLJ 267.

Consider again the form the letter of undertaking took in the instant case, and compare it with the language in s. 167(6). To reiterate, s. 167(6) provides that the court may make an order:

> ... but only upon an undertaking in writing **given to the Court** that information acquired by the auditor during his inspection shall not be disclosed by him **except to that director**. (emphasis added).

The undertaking furnished by the auditor does not comply with the express requirements of s. 167(6) in that:

(i) It is not addressed to the court or to anyone in particular

(ii) The auditor has extended the class of persons to whom he may disclose the results of his inspection to his own officers, employees, appointed servants or agents and to the "appointed servants and/or appointed servants/ agents of the plaintiff.

From this, it is clear that the letter of undertaking is found wanting. It is in fact bad, and by virtue of the words 'but only upon an undertaking' the power to make the order sought by the plaintiffs has not arisen due to the plaintiffs' failure to furnish the required undertaking.

It is critical that the undertaking be read in conjunction with the language of s. 167(6), which provides a narrow approach since strict observance is a requisite. However the undertaking given by the plaintiffs' auditor takes a liberal approach where it had arbitrarily extended the category of persons to whom the auditor may disclose the results of his inspection, ie, to his own officers, employees, approved servants or agents and to the appointed servants and/or appointed servants/agents of the plaintiffs.

It is this court's view that the language of s. 167(6) is precise and is therefore more than just an adjunct. It is clear that though the right to inspect accounting and other records under s. 167(6) requires the court to exercise its discretion in allowing auditors to inspect such records on behalf of the directors concerned, the discretion reposed in the court must be grounded on the precise requirements under statute. This necessarily means that when the undertaking is conditional, the conditions must be fulfilled before the undertaking will be enforced.

In that connection in finding the letter of undertaking defective for non-compliance with statutory requirements, this court's discretion has not arisen, and consequentially this court is precluded from considering this application at all.

In any case, the plaintiffs' subsequent attempt at correcting an otherwise defective letter of undertaking is feeble and unsustainable.

Thus the plaintiffs' dismal failure in putting up a good undertaking puts this application in jeopardy, and on that ground the plaintiffs' application is dismissed with costs.